IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 55512-0-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
CHRISTINE ANNYAS,	)	
	)	
Appellant.	)	FILED: **September 25, 2006**

SCHINDLER, A.C.J. – Christine Annyas was convicted of first-degree kidnapping and second-degree attempted murder of her mother Colleen Annyas.[1] Colleen did not testify at trial. The trial court admitted Colleen's hearsay statements, which assigned guilt to Christine and her boyfriend, Steven Bartholomew, through the testimony of the couple who rescued Colleen from the roadside and of the medical staff who treated her a few days after the incident. Christine argues the hearsay statements were testimonial in nature, and the trial court's decision to admit the hearsay statements violated her Sixth Amendment right to confront her accuser under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Christine also raises a number of additional arguments in her statement of additional grounds for relief.

[1] For the sake of clarity, we refer to Colleen and Christine Annyas by their first names. We intend no disrespect by doing so.

We conclude Colleen's hearsay statements to the couple who rescued her on the night of the assault were not testimonial, and the trial court's decision to admit the statements did not violate Christine's right to confrontation or Crawford. And, while the hearsay statements Colleen made to the medical treatment providers were testimonial and erroneously admitted, because these statements were cumulative, we conclude the error was harmless beyond a reasonable doubt. We affirm Christine Annyas's conviction for first-degree kidnapping and second-degree attempted murder.

FACTS

Just after 9:00 p.m. on November 17, 2002, Joan and Gary Ensley were driving through an isolated and rural part of Skagit County when they saw a woman by the side of the road. When Joan Ensley got out of the truck, she saw that the woman, Colleen Annyas, was gripping a set of jumper cables and shaking from the cold. Joan Ensley put her coat around Colleen and helped her into their truck. The Ensleys both noticed that Colleen's hair was matted and dirty, she was wet and cold, and she appeared to be in shock. Colleen told the Ensleys that her daughter, Christine Annyas, and her daughter's boyfriend, Steven Bartholomew, beat her up, forced her into a vehicle, tied her up with jumper cables, and left her in the woods lying in a puddle of water.

The Ensleys wanted to take Colleen to a hospital emergency room, but she refused. Colleen said she was afraid law enforcement would be contacted and her daughter would retaliate and not let her see her grandchild. At Colleen's insistence,

the Ensleys dropped her off at a hotel in Burlington.

Two days later, at about 2:30 in the afternoon, Colleen called 911 to report the assault. An emergency medical technician, Isle Lindall, and a Burlington police officer, Todd Schwiesow, responded to the 911 call. Lindall examined Colleen and noticed bruising on her face, particularly around her right eye. Colleen told Lindall that she was tied up with jumper cables and assaulted by her daughter and her daughter's boyfriend. While Lindall examined Colleen, Officer Schwiesow searched the hotel room for evidence and seized damp**,** stained clothing and jumper cables.

Lindall and Officer Schwiesow then took Colleen to the hospital emergency room. With officers present in the emergency room, Dr. Donald Slack examined Colleen and found bruising on her face, right buttocks, forearms, leg, and chest wall. Dr. Slack asked Colleen how she received her injuries, and Colleen said she was taken by force out to Walker Valley and hit in the face with fists by her daughter and her daughter's boyfriend. After the examination, Colleen filled out a police report with Officer Michael Lumpkin.

Christine Annyas and Steven Bartholomew were charged with first-degree kidnapping and first-degree attempted murder. Christine and Bartholomew were tried together as co-defendants.

At trial, Todd Evans, a friend of Christine's, testified about what happened at Christine's apartment on November 17. Evans said that when he and another friend went to Christine's apartment on Saturday, November 16, Colleen was there taking care of Christine's two-year-old son. Christine and Bartholomew were out for the

evening. Evans and his friend stayed at Christine's apartment and drank a bottle of vodka and some beer with Colleen. Evans spent the night and stayed the next day. Christine and Bartholomew returned on Sunday at around 6:30 p.m. Colleen was angry because they were late. Colleen and Bartholomew immediately started arguing. Then Colleen and Christine argued. The argument between Christine and Colleen turned into a physical fight. Colleen ended up slumped on the ground outside the apartment. Christine picked Colleen up and put her in the back of the car. She told Evans to stay with her son, and said she and Bartholomew were taking Colleen back to Burlington. Colleen's belongings were still in bags inside the apartment. Evans testified that the trip to Burlington and back would have taken about 30 to 40 minutes. But according to Evans, Christine and Bartholomew returned about an hour to an hour and a half after they left.

Colleen did not testify at trial despite the State's diligent efforts to locate and secure her attendance. The trial court found the State exercised due diligence and ruled Colleen's hearsay statements to Joan and Gary Ensley, Dr. Donald Slack, and Ilse Lindall were admissible under the ER 803 excited utterance and medical treatment exceptions.

At trial, the Ensleys described Colleen's appearance when they stopped to help her. The Ensleys testified that Colleen said she was beaten up by her daughter and daughter's boyfriend, tied up with jumper cables, and left in the woods. Dr. Donald Slack and Ilse Lindall testified that Colleen said her daughter and daughter's boyfriend assaulted her.

A jailhouse inmate, Dawn Imes, also testified. Imes said Christine boasted about beating up and trying to kill her mother and described details of the crime. According to Imes, Christine was angry the attempts to kill her mother failed.

The jury convicted Christine of first-degree kidnapping and second- degree attempted murder.[2] Christine appeals her convictions.

ANALYSIS

Christine claims the trial court violated her Sixth Amendment right to confrontation by admitting Colleen's hearsay statements through the testimony of the Ensleys and the health care providers. This court reviews whether a defendant was unconstitutionally deprived of the right to confront his accuser de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

The Confrontation Clause of the Sixth Amendment dictates that in all "criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

In Crawford, the Supreme Court held that the right to confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54. While declining to offer a comprehensive definition of testimonial, the Court stated that at a minimum, the

[2] Bartholomew was convicted of second-degree kidnapping and second-degree attempted murder. He appealed his conviction, raising identical arguments challenging the admission of Colleen's statements to the Ensleys and the medical staff. In an unpublished opinion, State v. Baratholomew, 2006 Wash. LEXIS 141 (2006), this court affirmed his conviction.

term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. at 68. The Court also noted that "not all hearsay implicates the Sixth Amendment's core concerns." Id. at 51. The Court identified several types of statements it considered nontestimonial, such as: (1) off-hand, overheard remarks, (2) casual remarks made to an acquaintance, (3) business records or statements in furtherance of a conspiracy, (4) dying declarations, and (5) statements made unwittingly to a government informant. Id. at 51, 56-57.

Post-Crawford, the Washington State Supreme Court, in State v. Davis, 154 Wn.2d 291, 302, 111 P.3d 844 (2005), aff'd by, Davis v. Washington, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), held that the admission of hearsay statements of a domestic violence victim in a 911 call did not violate the defendant's right to confrontation or contravene the Court's decision in Crawford.

In deciding whether statements admitted under the excited utterance exception to the hearsay rule are testimonial and violate a defendant's Sixth Amendment rights, the Washington Supreme Court concluded it is necessary to examine the circumstances of the statements in each case in order to determine whether "the declarant knowingly provided the functional equivalent of testimony to a government agent." Davis, 154 Wn.2d at 302. The Court held that where statements made during a 911 call are a plea for help or protection, rather than prosecution, the statements are not testimonial. Id. at 304. In reaching this conclusion, the Davis Court distinguished emergency 911 calls from the in-custody

police interrogation that took place in Crawford: "[e]ven though an emergency 911 call may assist police in investigation or assist the State in prosecution, where the call is not undertaken for those purposes, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned." Davis, 154 Wn.2d at 301. The Court stated that the declarant's perspective and purpose for making a statement are important factors to consider in deciding whether a statement is testimonial, and concluded that the emergency 911 call identifying the assailant was not testimonial "because of [the] immediate danger [and] there [wa]s no evidence [the victim] sought to 'bear witness' in contemplation of legal proceedings." Davis, 154 Wn.2d at 304.[3]

The U.S. Supreme Court affirmed the Court's decision in Davis, holding that the hearsay statements in the 911 call were not testimonial because the circumstances "objectively indicate [the call's] primary purpose was to enable police assistance to meet an ongoing emergency." Davis, 126 S. Ct. 2277. In determining whether the statements were testimonial, the Court pointed out several differences between the 911 operator's questions in Davis and the interrogation in Crawford. In Davis, the victim was describing events as they actually happened, the victim was facing an ongoing emergency, the answers were necessary for law enforcement to resolve the emergency, and the questioning during the call was informal in contrast to the structured formal interrogation in Crawford concerning past events. Davis,

[3] The Court decided that other statements in the 911 call that were not related to seeking help and protection were testimonial but admission was harmless. Davis, 154 Wn.2d at 305.

126 S. Ct. at 2276-77. As in Crawford, the Court in Davis explicitly declined to consider "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" Davis, 126 S. Ct. at 2274 n.2.

The trial court admitted Colleen's statements to the Ensleys under the excited utterance exception to the hearsay rule.[4] In considering whether the admission of hearsay statements that qualify as excited utterances are testimonial, this court has declined to adopt a per se rule that such statements are not testimonial. State v. Walker, 129 Wn. App. 258, 269, 118 P.3d 935 (2005), State v. Moses, 129 Wn. App. 718, 728, n.12, 119 P.3d 906 (2005), rev. denied, 157 Wn.2d 1006 (2006). Nevertheless, contemporaneous statements made under the stress of a traumatic event generally do not implicate the Confrontation Clause. For example, in State v. Orndorff, 122 Wn. App. 781, 787, 95 P.3d 406 (2004), rev. denied, 154 Wn.2d 1010 (2005), the defendants unlawfully entered the home of Kenneth Nordby while Nordby, Lorina Coble, and two minors were present. During the commotion that ensued, Coble told Nordby that she saw a man with a pistol downstairs, she saw two men leave, and she tried to call 911. Id. at 785. Coble was unavailable to testify at trial, but the court allowed Noble to testify to her statements under the excited utterance exception. Id. at 785. On appeal, Orndorff argued that his constitutional right to confrontation was violated. We disagreed and held that Coble's statement was not testimonial because it was a spontaneous declaration in response to a stressful incident and Coble had no reasonable

[4] ER 803(a)(2).

expectation that her statement would be used in a future prosecution. Id. at 786-87. See also, State v. Ohlson, 131 Wn. App. 71, 125 P.3d 990 (2005), (statements made by a victim to a police officer who arrived at the scene of the crime within minutes after the defendant tried to run over the victims were not testimonial).[5]

Christine argues that Colleen's hearsay statements to the Ensleys were testimonial because the Ensleys would reasonably believe the statements would be used at a later trial. But, the critical question in determining whether out-of-court hearsay statements are testimonial is whether the circumstances objectively indicate the *declarant's* purpose. See Davis, 154 Wn.2d at 302-04 (court examines objective circumstances of statements to determine the declarant's purpose).[6]

Here, the Ensleys were driving back to the Seattle area late Sunday evening after spending the weekend at their property in Skagit County. While driving through Walker Valley, a very isolated and rural part of the county, they saw a woman alone by the side of the road. The Ensleys turned their truck around and stopped to see if the woman needed help. Colleen was wet and shaking from the cold. She was gripping a pair of jumper cables and appeared to be in shock. Colleen's statements to the Ensleys as they drove to Burlington were made while she was under the stress of the recent kidnapping and assault. The Ensleys were not involved in law enforcement, and there is no indication Colleen made her

[5] In Ohlson, Division Two also disagreed with this court's decision in State v. Walker, 129 Wn. App. 258, 259, 118 P.3d 855 (2005) and adopted a per se rule that excited utterances cannot be testimonial. Ohlson, 131 Wn. App. at 81.

[6] Not only do we disagree with the standard Christine urges this court to apply, but also there is no evidence that the Ensleys were associated with law enforcement or would have reasonably believed Colleen's statements were made for future prosecutorial purposes.

statements for prosecutorial purposes, especially in light of her refusal to involve law enforcement by going to a hospital emergency room. The objective circumstances indicate Colleen's statements to the Enselys were not testimonial. We conclude the trial court's decision to admit the statements did not violate Christine's Sixth Amendment right to confrontation or the Court's decision in Crawford.

Statements to Lindall and Dr. Slack

Annyas also contends the admission of Colleen's statements to Lindall and Dr. Slack that she was assaulted by her daughter and her daughter's boyfriend violated her right to confrontation because the statements were testimonial.

After Crawford, this court considered the admissibility of statements to medical personnel and held that statements made by a domestic violence victim to an emergency room physician were not testimonial. Moses, 129 Wn. App. at 730. In Moses, the examination took place within hours of the assault, and the doctor asked questions in order to provide treatment. In determining whether statements made to health care providers are testimonial, the focus of the inquiry is on the purpose of the declarant's encounter with the health care provider. Id. at 730. In Moses, where the doctor had no role in investigating the assault and was not working on behalf of or in conjunction with the police or other governmental officials to develop testimony for prosecution, the circumstances indicated that the victim's statements were made for the purpose of obtaining medical treatment. Id. at 730. In addition, there was nothing in the record to indicate the victim believed her

statements to the doctor would be used at a subsequent trial. Id.

In concluding the victim's statements were not testimonial, the Moses court distinguished cases where there is a clear "prosecutorial purpose" for the medical examination, citing, as examples, State v. Virgil, 104 P.3d 258, 265 (Colo. App. 2004), aff'd in part and rev'd in part, 127 P.3d 916 (Colo. Sup. Ct. 2006) and In re T.T., 351 Ill. App. 3d 976, 993, 287 Ill. Dec. 145, 815 N.E.2d 789 (2004), where examinations were conducted some time after the assaults, and courts concluded the purpose of the medical examination was to preserve evidence for prosecution.

Here, the circumstances indicate Colleen's contact with the medical treatment providers was for both investigatory and treatment purposes. Colleen called 911 two days after the incident to "report" the assault. An emergency medical technician, Lindall, and a police officer, Officer Schwiesow, responded to the 911 call. When Lindall arrived at the hotel, Officer Schwiesow was already there. Colleen told Lindall that she had been beaten up and tied up with jumper cables by her daughter and her daughter's boyfriend. Lindall examined Colleen while Officer Schwiesow gathered evidence.

And, while the emergency room doctor, Dr. Slack, provided medical treatment, police officers were present during the examination. Dr. Slack testified that the reason he conducted a comprehensive, head-to-toe examination of Colleen was because "definitely at this point I considered the possibility that this would be a case that might reach court."[7] During the examination, Colleen told Dr. Slack that

[7] Dr. Slack testified that when he saw Colleen, she was still in pain due to her injuries. Dr. Slack gave her pain medication and ordered chest X-rays because of his

she had been assaulted by her daughter and her daughter's boyfriend. The officers took photographs of Colleen's injuries. After Dr. Slack's examination, Officer Lumpkin interviewed Colleen further and assisted her in writing a police report.[8]

The objective circumstances indicate the primary purpose of Colleen's 911 call two days after the kidnapping and assault was for prosecutorial purposes. The evidence suggests that Colleen changed her mind about getting law enforcement involved when she decided to report the crime, and the State presented no evidence suggesting Colleen's statements were pertinent to medical treatment. This case is different from Moses, where the victim visited the hospital shortly after the assault for the primary purpose of obtaining medical care for her broken jaw, and the examination and the evidence did not suggest the examination was conducted primarily for prosecutorial purposes.

On this record, we conclude Colleen's statements to Lindall and Dr. Slack were testimonial and admission on these statements violated Christine's Sixth Amendment right to confrontation. But, a violation of the right to confrontation is subject to a harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d. 674 (1986). The inquiry is whether, assuming the damaging potential of the testimony was fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684. Factors bearing on this inquiry include "the importance of

concern that she could have fractured ribs or bruising on her kidney.

[8] Officer Lumpkin also gave his camera to the medical staff and asked them to take pictures of Colleen's back without her shirt on, outside of his presence.

the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 686-87.

Colleen's hearsay statements to Lindall and Dr. Slack were almost entirely cumulative of the more detailed and properly admitted statements to the Ensleys. Even though the admission of the statements was error, we conclude the error was harmless beyond a reasonable doubt.

Additional Grounds for Review

1. Merger

Christine claims her conviction for first-degree kidnapping merged with her conviction for second-degree attempted murder because the State relied on the kidnapping conviction to prove attempted murder. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). And, even if two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses. State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996). Contrary to Christine's argument, because kidnapping was not an element of the crime of attempted murder, there is an independent purpose

to both statutes, and the two crimes do not merge.

2. Due Diligence by the State

Christine claims the State did not exercise due diligence in attempting to secure Colleen's presence for trial.

"The right to compulsory attendance of material witnesses is a fundamental element of due process and goes directly to the right to present a defense." State v. Carlisle, 73 Wn. App. 678, 679, 871 P.2d 174 (1994). When a key witness is unavailable, the State has the burden to present substantial evidence that it exercised due diligence in attempting to secure the witness for trial. State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988). Due diligence requires a reasonable, good faith attempt. State v. DeSantiago, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003).

Detective Thomas Wenzl testified that after his initial interview with Colleen in November, he remained in contact with her until the end of January. From January until June, however, Wenzl had trouble contacting her. Wenzl called the Bellingham Police Department, and they put out an attempt to locate (ATL) for Colleen. Wenzl also put an ATL for Mount Vernon. In late June, Wenzl located Colleen, served Colleen with a subpoena, and facilitated the defense interview with her. Colleen then gave Wenzl her post office box address.

As the November trial date approached, Wenzl was again unable to locate Colleen. Wenzl sent a letter to her post office box and repeatedly checked to see whether Colleen picked up her mail. He also checked the countrywide computer

system to see if any other police departments had contact with her. Wenzl had the Anacortes Police Department put out an ATL and check a campground where Colleen was last known to be staying. Despite these efforts, Wenzl could not locate Colleen before trial.

The trial court concluded the State exercised due diligence. Christine claims the trial court's decision was an abuse of discretion because Colleen allegedly had contact with the Mt. Vernon police department several days after the trial ended. But, there is no evidence in the record confirming Christine's allegations. And, even if there was, the alleged contact did not occur until after the trial concluded and does not negate the court's decision that based on the record at trial, the State made a good faith effort to secure Colleen's presence for trial.

3. Statements by Jailhouse Informant

One of Christine's cell mates at the Skagit County Jail, Dawn Imes, testified at trial that Christine described the details of the crime, continually boasted about how she beat up and tried to kill her mother, and expressed anger that the attempt did not succeed. Imes approached law enforcement and offered to testify about what Christine said. The State had asked Imes to wear a body wire for subsequent conversations. At trial, the State agreed that Imes would limit her testimony to the statements Christine made before Imes wore a body wire. Christine claims Imes testified to statements made after she was wearing the body wire, but does not cite to the record or to authority, and there is no way to confirm this allegation. And, at

trial, there were no objections by Christine's attorney to Imes's testimony as beyond the scope of the agreed limitations.

4. Prosecutorial Misconduct

Christine claims she was denied a fair trial by prosecutorial misconduct during closing argument. But, because Christine does not identify specific remarks that were objectionable, we are unable to review this claim of error. RAP 10.3 (an appellant must identify the errors he or she alleges were made by the trial court and cite relevant references in the record).

5. Ineffective Assistance of Counsel

Christine also claims she was deprived of a fair trial by ineffective assistance of counsel. Following trial, Christine made a motion for a new trial based on ineffective assistance. The trial court appointed new counsel to represent her in that motion, and the court ultimately denied it.[9] In her statement of additional grounds, Christine alleges that her counsel did not make decisions independently of Bartholomew's counsel. She also lists a number of things counsel did not do, such as issue subpoenas, file a motion for a change of venue, and make a motion to suppress or interview witnesses.

In order to prove ineffective assistance of counsel, a defendant must show that the attorney's performance was deficient and that prejudice resulted. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Christine does not

[9] Christine's claim below was based primarily on allegations that counsel failed to show her a letter written by Bartholomew to another woman before trial, failed to protect her from pressure from Bartholomew, failed to inform her of the maximum possible sentence if she declined a plea bargain, and failed to pursue a diminished capacity defense.

explain how she was prejudiced by counsel's conduct. We conclude Christine has not established prejudice, and we reject her ineffective assistance of counsel claim.

Seizure of Papers from Jail Cell

The trial court judge imposed an order prohibiting Christine and Bartholomew from contacting each other. Christine claims her constitutional rights were violated when jail officials searched her cell and seized papers. It is clear that in October, shortly before trial, jail officials searched Bartholomew's jail cell and recovered his "blue tub" containing his personal property. Bartholomew's tub contained thousands of pages of paper, including letters to and from Christine, as well as legal documents pertaining to his defense. Deputies sorted through the papers, confiscated the letters, and returned the rest of the papers to Bartholomew. While portions of some letters written by Christine and seized from Bartholomew's cell were used at trial, it does not appear Christine's jail cell was searched.

Regardless, Christine has not established a constitutional violation based on letters seized from Bartholomew's cell. Prisoners do not have a reasonable expectation of privacy in their prison cells. Hudson v. Palmer, 468 U.S. 517, 525-26, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); In Re Personal Restraint of Benn, 134 Wn.2d 868, 909, 952 P.2d 116 (1998); State v. Garza, 99 Wn.App. 291, 295, 994 P.2d 868 (2000). Bartholomew's cell and the letters within it were lawfully searched. See U.S. v. Carrozza, 2 F. Supp. 2d 126, 127 (D. Mass 1998) (holding that prisoners have no expectation of privacy in the content of their letters).

Because the letters were either addressed to or from Christine, they "clearly

announced" to deputies that they were contraband. See State v. Courcy, 48 Wn. App. 326, 331-32, 739 P.2d 98 (1987) ("Because the container clearly announced it contained contraband, any reasonable expectation of privacy as to its contents was lost."). There is no expectation of privacy in contraband.

We affirm Christine's conviction for first-degree kidnapping and second-degree attempted murder.

Schindler, ACJ

WE CONCUR:

Becker, J. Mann, J.